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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

WILLIAM WATT SUMMERS,

Petitioner,

vs.

NATHAN A. McCOY, UNITED STATES POST-MASTER AT COLUMBUS, OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, The Supreme Court of the United States:

The petitioner, William Watt Summers, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit, entered October 21, 1947 (R., 205), and the order denying petition for rehearing, filed January 5, 1948 (R., 215), affirming a judgment against this petitioner of the District Court of the Southern District of Ohio, Eastern Division (R., 194).

STATEMENT OF MATTER INVOLVED.

Petitioner filed suit in the District Court to enjoin respondent, who is the local postmaster at Columbus, Ohio, from enforcing a fraud order of the Postmaster General (R., 26), purporting to have been issued under the so-called Postal "fraud order statutes" (U. S. C. A., Title 39; Secs. 259, 732, R. S. 3929, 4041; 28 Stat., 964, 26 Stat., 466). Petitioner sought injunctive relief upon the ground that the Postmaster General had exceeded his authority in issuing the fraud order (R., 6, 8).

Petitioner relies not only upon the allegations of certain uncontroverted and ultimate facts in his complaint (R., 1), but also upon the complete transcript of proceedings taken before the postoffice department (R., 39-155) and the memorandum for the Postmaster General embodying a finding of fact and recommendations (R., 27) together with the fraud order in question which is set forth in full (R., 26).

BASIS OF JURISDICTION OF THIS COURT.

(a) The jurisdiction of this court is invoked under Section 240, Judicial Code, 28 U. S. C. A., Sec. 347.

(b) The construction and application of the law to the facts in this case involve the so-called "fraud order statutes" (39 U. S. C. A., Secs. 259, 732) and the pertinent portion of said Section 259 reads as follows:

> "The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct Postmasters at any Post Office at which registered letters or any

other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the Postmaster at the office at which it was originally mailed with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such Postmasters shall be by them returned to the writers thereof * * *."

Said Section 732 has the same material provisions but forbids the payment of any postal money order. Both sections are invoked by the fraud order in question.

(c) The judgment of the Circuit Court of Appeals was made and entered October 21, 1947 (R., 205), and the order denying petition for rehearing was filed January 5, 1948. The petition was filed in this court after January 15, 1948, and before February 4, 1948.

QUESTIONS PRESENTED.

I. Has Congress entrusted the administration of the "fraud order statutes" wholly to the unbridled discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under them?

II. Has the Postmaster General the authority under these statutes to issue a fraud order based solely upon opinion evidence as to the efficacy of a substance which is being sold, and which evidence is clearly not substantial?

III. Did this court intend by its decision in the case of Leach v. Carlile, 258 U. S., 138, to modify the rule of law which was laid down in the case of American School of Magnetic Healing v. McAnnulty, 187 U. S., 94, at page 106, wherein this court held, "unless the question may be reduced to one of fact, as distinguished from mere

opinion, we think these statutes can not be invoked for the purpose of stopping the delivery of mail matter"?

IV. In order to invoke these statutes, must there be substantial evidence of a scheme to defraud and of intentional falsity adduced before the Postmaster General?

REASONS FOR ALLOWANCE OF THE WRIT.

Reason I.

Congress never intended to place in the hands of the Postmaster General the authority or power to issue a fraud order with the attendant ruin of the person against whom it is directed, solely upon mere opinion evidence which varies according to prejudices of those who express them; that such a power is repugnant to our traditions, and the Postmaster General is without authority to issue a fraud order upon insubstantial or opinion evidence alone.

Reason II.

That the question of whether or not the Postmaster General may issue a fraud order which is supported only by mere opinion evidence without there, also, being adduced before the Postmaster General substantial evidence of a scheme to defraud, substantial evidence of intentional falsity and substantial evidence of actual deception, and this question is of such wide importance and public interest and concern that it should be definitely decided by this court.

Reason III.

That the question as to whether or not this court intended to relax, to any extent, its holding in the case of American School of Magnetic Healing v. McAnnulty, 187 U. S., 94, by its decision in the case of Leach v. Carlile,

258 U. S., 138, is definitely of importance and of public interest and concern and should be definitely announced by this court as to whether or not it still adheres to its holdings in the Magnetic Healing case.

Reason IV.

That the Circuit Court of Appeals for the Sixth Circuit, has decided a federal question in conflict with the decision of this court in the case of American School of Magnetic Healing v. McAnnulty, 187 U. S., 94, wherein this court held that these fraud order statutes were intended to cover only cases of actual fraud in fact, in regard to which opinion formed no basis, and that the Postmaster General has no authority to issue a fraud order unless the question is one of fact as distinguished from mere opinion.

For these reasons, it is respectfully submitted that this petition should be granted.

William Watt Summers,
Petitioner.

We hereby certify that the foregoing petition is well founded and is not interposed for delay.

James N. Linton,

Henry J. Linton,

Attorneys for Petitioner.

State of Ohio, Franklin County, ss.:

William Watt Summers, being first duly sworn, deposes and says; that he is the petitioner named in the foregoing petition in the above-entitled action; that he has read said petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief and as to such matters that he believes it to be true.

William Watt Summers.

Subscribed and sworn to before me this twenty-eighth day of January, 1948.

Grace Doerflein,

Notary Public in and for the County of Franklin, State of Ohio.

My commission expires January 18, 1951.

BRIEF IN SUPPORT OF PETITION.

OPINIONS OF THE COURTS BELOW.

I. The order for judgment of the District Court was entered May 2, 1947 (R., 194). There was no opinion filed by the court, nor was there any memorandum filed of findings of fact and conclusions of law.

II. The judgment of the Circuit Court of Appeals was filed and entered on October 21, 1947 (R., 205). There was no opinion filed by the Circuit Court of Appeals.

III. The order denying petition for rehearing by the Circuit Court of Appeals was filed and entered January 5, 1948 (R., 215). There was no opinion filed by the Circuit Court of Appeals.

JURISDICTION.

The jurisdiction of this court is invoked under the provisions of Judicial Code Section 240, amended, 28 U. S. C. A., Sec. 347, which reads as follows:

> "(a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

As established by the complaint (R., 1), the action is one arising under the Postal Laws, Section 259 and Sec-

tion 732 of Title 39, United States Code. We here copy the pertinent portions of said statutes:

"259. Mail of persons conducting lotteries or fraudulent schemes returned; evidence of agency.—The Postmaster General may, upon evidence satisfactory to him that any person or company * * * is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post offices at which registered letters or any other letters or mail matter arrive directed to such person or company, or to the agents or representatives of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the Postmaster at the Post Office at which it was originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein, but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself. (R. S. 3929; Sept. 19, 1890, c. 908, 2, 26 Stat. 466; Mar. 2, 1895, c. 101, 4, 28 Stat. 964.)

732. Payment of orders issued in favor of lotteries.—The Postmaster General may, upon evidence satisfactory to him that any person or company * * * is conducting any other scheme for obtain-

ing money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation or association of any kind and may provide by regulation for the return to the remitters of the sums named in such money orders.

This shall not authorize any person to open any letter not addressed to himself.

A public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme or device, that remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation or association named therein, shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of said agency in any other legal way. (R. S. 4041; Sept. 19, 1890, c. 908, 3, 26 Stat. 466.)"

Jurisdiction in the Circuit Court of Appeals was under the provisions of 28 U. S. C. A., Sec. 225 (a) and (d).

The jurisdiction of this court is invoked upon the following grounds:

1. That the Circuit Court of Appeals of the Sixth Circuit, has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

2. That the said Circuit Court has decided a federal question in a way probably in conflict with applicable decisions of this court.

STATEMENT OF FACTS.

Petitioner, William Watt Summers, is a citizen and taxpayer of the city of Columbus, Ohio, and has for more than twelve years been engaged in the business of vending through the mails and drug stores, a suppository formulated by one Dr. D. J. Herschberger, who was a practicing physician until the time of his death in the city of Lancaster, Ohio (R., 42), that in the furtherance of his business he placed advertisements in magazines (R., 9) and issued a pamphlet (R., 10) to further his business, in both of which he recommended the use of this suppository by persons suffering from prostate gland trouble.

On March 13, 1946, William C. O'Brien, an attorney in the United States Post Office Department, issued certain specifications of charges and memorandum recommending an issuance of a citation to show cause why a fraud order should not issue (R., 11).

A hearing was held on April 16, 1946 (R., 39).

On December 26, 1946, a fraud order was issued (R., 26) together with a memorandum for the Postmaster General embodying a finding of fact and recommendations for an issuance of a fraud order (R., 27).

At the hearing on April 16, 1946, in support of the charge a post office inspector testified as to test letters and produced copies of the advertisement and pamphlet above mentioned (R., 45). A chemist from the pure food and drug department testified as to the contents of the suppository (R., 63).

Next testified Dr. Fred W. Norris (R., 57-74), a doctor from the food and drug administration, giving his qualifications (R., 58) as having obtained his M.D. degree in

1924 with a medical experience of internship of four years and with a general practice experience of two years and rendered his opinion, that this suppository was not effective (R., 65-74).

However, on cross examination, Dr. Norris admitted (R., 74-79) that all of the symptoms mentioned in the advertisement and pamphlet are possible symptoms of prostate gland ailments and nowhere in his testimony did he show any statement in the advertisement or pamphlet to be untrue; neither did the doctor show that he had made any experiment or had used the suppository in connection with any type of case.

In short, his entire testimony in effect was that the suppository formulated by Dr. Herschberger for use in prostate gland ailments was ineffective, which amounted only to the unsupported opinion of one doctor as to the efficacy of another doctor's prescription.

The government then rested its case.

The petitioner then testified (R., 92-132) as to how he got started in the business with Dr. Herschberger's consent and how he conducted his business.

The next witness was petitioner's wife, May J. Summers (R., 132-138), who had acted as his bookkeeper in the operation of this business and had with her the records of the business, showed how the business was conducted and testified that three-fourths of the business depended on reorders from users of the suppositories (R., 134); and that out of ten thousand dollars worth of business covering a period of about two and one-half years, there were around sixty or seventy dollars worth of refunds (R., 135).

To support her testimony she had with her letters placing reorders and one was offered for the record (R., 136)

to support this point, but was rejected by the trial examiner (R., 136).

At no place in the testimony was any evidence offered from which could be any inference drawn that the petitioner was conducting a scheme to defraud or any deception or falsity. From the memorandum filed with the fraud order (R., 27) by the trial examiner, can be found no other claim than that which is placed on the opinion of Dr. Norris as to the efficacy of the medicine.

On December 31, 1946, the petitioner filed his complaint in the District Court and on February 12, 1947, it was agreed (R., 183) that the case would finally be submitted on the filing of briefs and on May 2, 1947 (R., 194), the District Court entered its judgment against the petitioner without a memorandum, findings of fact and conclusions of law. This cause was then appealed to the Circuit Court of Appeals for the Sixth Circuit, duly argued and on October 21, 1947, the Court of Appeals rendered its judgment (R., 205) and on January 5, 1948, entered an order overruling petition for rehearing.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred:

(1) In affirming judgment of the District Court.

(2) In failing to follow the clear and unambiguous ruling of this court in the case of American School of Magnetic Healing v. McAnnulty, 187 U. S., 94, 106, that,

> "Unless the question may be reduced to one of fact, as distinguished from mere opinion, we think these statutes can not be invoked for the purpose of stopping the delivery of mail matter."

ARGUMENT.

I.

The Evidence of Alleged Fraud Presented Before the Postmaster General and Upon Which the Fraud Order is Based, Consisted Only of the Mere Expressions of Opinion of One Witness and Was Clearly Insubstantial.

There has been no opinion filed on findings of fact filed by the District Court and no opinion filed by the Circuit Court of Appeals pointing to the evidence.

The judgment of the Circuit Court of Appeals (R., 205) we here quote:

> "This appeal having been considered by the court on the record, arguments of counsel and respective briefs;
>
> And it appearing that the order of the Postmaster General of which the appellant complains, was fairly arrived at, has substantial evidence to support it and is not palpably wrong or arbitrary;
>
> It is ordered that the judgment of the District Court be and is affirmed. Leach v. Carlile, 258 U. S. 138; Farley v. Heininger, 105 Fed. (2) 79."

In the petition for rehearing before the Circuit Court of Appeals (R., 207), Leach v. Carlile, 258 U. S., 138, and Farley v. Heininger, 105 Fed. (2d), 79, were differentiated from this case.

In those cases there was evidence establishing actual fraud in fact, whereas, in this case, there is no such evidence establishing fraud in fact, but merely the opinion of one doctor as to the efficacy of the prescription of another doctor, and in said petition for rehearing (R., 211)

we respectfully expressed the hope that the Circuit Court of Appeals would render an opinion pointing out from the record the evidence of fact upon which said judgment is based.

In the case of Leach v. Carlile, 258 U. S., 138, this court, we believe, disposed of much of the evidence as to the question that the appellant was guilty of fraud in fact when in the opinion at page 138, it is stated:

> "Appellant is an old offender, a prior fraud order having been issued against him, under another name, in April, 1918, as a result of which he changed his tradename and modified in a measure his advertising matter."

This court in its opinion further stated:

> "The order complained of was entered after an elaborate hearing, of which the appellant had due notice and at which he was represented by counsel, and introduced much evidence.
>
> The only error assigned in this court is the affirming by the Circuit Court of Appeals of the decree of the District Court, refusing the injunction and dismissing the bill. In argument it is contended that the question decided by the Postmaster General was that the substance which the appellant was selling did not produce the results claimed for it; that is, on the record, was a matter of opinion, as to which there was conflict of evidence; and that therefore the case is within the scope of American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33. Without considering whether such a state of facts would bring the case within the decision cited, it is sufficient to say that the question really decided by the lower courts was not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public. This was

a question of fact which the statutes cited committed to the decision of the Postmaster General, and the applicable, settled rule of law is that the conclusion of a head of an executive department on such a question, when committed to him by law, will not be reviewed by the courts, where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary. * * *" (Citing numerous decisions)

"An examination of the record fully justified the conclusion of the Circuit Court of Appeals that it not only fails to show that the Postmaster General had no warrant of law for his order, but that, on the contrary, it shows there was abundant ground for it."

It is our contention that this court never intended to deviate from the principles laid down in the Magnetic Healing case, supra; and that the District Court and Circuit Court erred in rendering a judgment based, solely, on the opinion of one witness as to the efficacy of the suppository being sold by appellant.

We are confident that when this court examines the record of the proceedings before the Postmaster General (R., 39-155) that it will, at once, see that it would have been impossible for the District Court to have justified its judgment in an opinion and findings of fact; and that the judgment of the Circuit Court of Appeals, in affirming the District Court and finding that there was substantial evidence to support the fraud order, could not have been supported by an opinion pointing to the evidence establishing fraud in fact.

We, therefore, respectfully request this court, in considering this case, not to accept the findings of the Circuit Court of Appeals as conclusive on which to apply the law in this case, because when it does examine the

record of the proceedings before the Postmaster General, we contend no evidence, sufficient to establish a fraud in fact, was adduced and do not appear in the record, and that the only evidence in the record is the unsupported opinion of a doctor, having but a meager experience, that the suppository prepared according to the prescription, of another doctor, belonging to the homeopathic school, was not an effective treatment in prostate gland ailments.

It is, therefore, believed by us that it would be extremely helpful to the public if this court would definitely reaffirm the principles that were laid down in the case of American School of Magnetic Healing v. McAnnulty, supra, and apply such principles, to the mere opinion evidence established in this case.

The applications of such principles will establish that both the District Court and the Circuit Court of Appeals erred in refusing to issue an injunction against the fraud order.

II.

There Was No Evidence Presented before the Postmaster General Disclosing Any Scheme for Obtaining or Attempting to Obtain Money Through the Mails by False Pretenses, Representations or Promises.

There was a complete failure to establish a scheme to defraud by any evidence whatsoever before the post office department.

The burden was upon the post office department to show that there was a "scheme" to defraud. The word "Scheme" limits the jurisdiction of the Postmaster General to those cases where actual intention of fraud is

shown. The Standard Dictionary, Twentieth Century Edition, defines "scheme," as "a plan of something to be done; a plot or device for the accomplishment of an object."

It has also been held that where one is charged with using the mails to carry out an act to defraud, there must be proof of intent to defraud.

There is absolutely no evidence before the Postmaster General from which can be adduced a "scheme" to defraud. The principle of law has been well stated in the case of Harrison v. U. S. (C. C. A., 6), 200 Fed., 662 at page 665:

> "* * * It is by the decisions settled, not as an all-inclusive definition, but as one sufficient for the purposes of this case, that the statutory 'scheme to defraud' may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange; and this deception may, of course, be by implication as well as by express words. On the other hand, the 'scheme' cannot be found in any mere expression of honest opinion as to quality or as to future performance. There must be the underlying intent to defraud. Budd v. U. S. (C. C. A., 8), 173 Fed., 912, 97 C. C. A., 462; Brown v. U. S. (C. C. A., 8), 146 Fed., 219, 76 C. C. A., 577. It is true that the Durland case contemplates as within the statute 'suggestions and opinions as to the future'; but the necessary limitations on a too broad construction of this language are indicated in the McAnnulty Case, 187 U. S., 94, 23 Sup. Ct., 33, 47 L. Ed., 90.
>
> "As it arises in the present case, the question is: When does the not uncommon exaggeration of advertising become sufficient evidence of an intent to defraud? Can a business man, selling an article of merit and of value and at a fair price, be convicted of a scheme to defraud, because his advertising overstates the capacity and usefulness of the article, if

so, where is the line to be drawn? And this brings us to the further question: How far are United States courts and juries to become censors of the advertising of manufacturers or dealers? This question stands out for answer, because nearly all business is now aided by advertisements passing through the mails, and on every hand we see claims of capacity, performance, and results which we know cannot stand cross examination.

"On what we think an exhaustive review of all the reported cases arising under this statute, we do not find any one which seems, on its face, to be of the class we have mentioned—exaggerated claims of merits of articles of inherent utility—unless it is Faulkner v. U. S., 157 Fed., 840, 85 C. C. A., 204, in which the Circuit Court of Appeals in the Fifth Circuit reversed a conviction because based merely on exaggerated advertising. The subject is also considered by Judge Deverans, then district judge, who said, in U. S. v. Staples (D. C.), 45 Fed., 195, 198:

"'Parties who have anything to sell have the habit of puffing their wares, and we are all familiar with the fact that it is a very prevalent thing in the course of business to exaggerate the merits of goods people have to sell, and within any proper reasonable bounds such practice is not criminal. **It must amount to some substantial deception, in order to be subject to cognizance by the courts.**'" (Emphasis ours.)

When this court reads the pamphlet and advertisement (R., 9 and 10) it will observe that there has not been disclosed any evidence that would justify a claim that there is a "scheme" on the part of the appellant in this case to defraud any one, plus the fact that he also has a "money back guarantee."

If there is no evidence disclosing a "scheme" or an intention to defraud, how can it be said that there is substantial evidence sufficient to justify a fraud order?

We have been unable to find any statement by this court on this specific fact and must still refer to lower courts to support our reasoning. We believe it is fundamental, without citation, that intention to defraud must be established under American Law. A person is not presumed to do evil or intend evil and evil intent must be proved, as is well stated in the case of Deavers v. U. S., 155 Fed. 2d, 740, 744.

> "(6) As for the instructions, appellant in his brief attacks particularly the trial court's failure to grant his instruction number 37 relating to the necessity for a 'criminal intent.' Yet, we find that the court sufficiently charged as follows: 'You are further charged that the fraud or conspiracy charged in the indictment in this case involves an evil mind and a wrongful intent. The purpose of the statute relating to frauds as affecting this case is to protect against intentional efforts to defraud others. If the defendant acted in good faith and had honest belief in the enterprise in which he was engaged, and in any statements which he made or authorized to be made, or of which he had knowledge, then he is not guilty of any wrong or crime and your verdict should be not guilty.'"

We also suggest that this case, when the advertising and pamphlet (R., 9 and 10) are being considered, falls within the reasoning of the case of Pinkus v. Walter, et al., 61 Fed. Sup., 610, decided by the District Court D, New Jersey, on July 18, 1945, wherein at page 614 the court says:

> "If as a matter of fact, the course suggested by the complainant in his advertising is deleterious to health, it would appear that the remedy lies in other fields than those governed by postal regulations. Too, frequently attempts to accomplish by indirection that which should be effected straightforwardly and directly. Surely the powers of government to

protect the health and well being of its citizens can better be met by supervising agencies within the actual scope of medical control and by expert regulation, than by more or less arbitrary prohibition by the post office department."

This court has approached the same reasoning in the case of Hannegan v. Esquire, 90 Sup. Ct. Law Ed., 429, decided February 4, 1946.

The question involved in this case is much larger than the petitioner alone, and we believe it would be extremely helpful to the public at large if this court would definitely lay down the principle that there must be adduced before the Postmaster General evidence that there is a "scheme" to defraud; and that it is not sufficient to draw all of these conclusions from a mere opinion of a doctor as to the efficacy of the medicine concerning which he has had no experience as to its use whatsoever.

III.

That the Fraud Order Should Fail for the Reason That There Was No Evidence Adduced Before the Postmaster General of Any Falsity in the Advertising or That Appellant Knew or Believed Any of His Advertising to be False.

The argument advanced on behalf of the previous point well applies here, but we want to further call the court's attention that it has been decided in the case of Read Magazine, et al. v. Hannegan, 63 Fed. Sup., 318, where at page 322 of the opinion, the lower court stated the whole case in four words:

"There is no deception."

This last mentioned case was carried to the Circuit Court of Appeals under Read Magazine, et al., v. Hannegan, cited as 158 Fed. 2d., 542 and decided December 9, 1946 at page 545 of the opinion, the court says:

"We are told that the Postmaster General must be sustained if his action is within 'The most malign interpretation which can in reason be put on' the advertisements, the quoted words being from an opinion of Judge Learned Hand while on the District Court in 1909. But that broad expression is limited by 'in reason,' and the judge's further description of the Postmaster General's power was circumscribed by the words 'reasonably conclude.' We think that it must necessarily be contemplated that any reasonable person proposing to enter a contest would read the rules if he were cautioned to do so, and would understand plain terms in them. To be within reason even the most malign impression must proceed from that minimum premise. If the Postmaster General's power were coextensive with the most malign impression to which advertisements might be susceptible, contrary to unambiguous terms plainly stated, he would be the unrestricted master of much of the country's business. We do not find that power in the simple and explicit language of the statute, which is limited to false or fraudulent pretenses, representations or promises. Advertisements which are clearly not false or fraudulent frequently have a certain extravagance and urgency in their appeals, which to the most malign, and even to the mildly cynical, are beyond the boundary of precise accuracy. If a general impression contrary to terms plainly stated is to be the basis for a fraud order, it must, we think, be the impression reasonably conveyed to the public to which the advertisement is addressed. The impression which is the criterion is that of a reasonable reader, not the most malign impression uninhibited by reason. We so held in Farley v. Simmons."

This court when it reads the advertisement and circular (R., 9 and 10) involved in this case, will clearly see that there must have been a most malign construction of the language to say that there has been any false or fraudulent statement in either the advertisement or the circular. The words used must be given their usual ordinary meaning. The circular is a frank statement and any person that orders this suppository after having read this circular, certainly can not feel that he has been defrauded when he can get his money back, if he does not realize any relief from its use. In the entire record there has not been disclosed one single complaint to the post office department with reference to the then ten years of operation of this business which has been conducted in an honest and respectable manner and there has been no deception. There has been no scheme to defraud. There is an honest belief in the efficacy of the suppository. This case comes within the four walls of American School of Magnetic Healing v. McAnnulty, supra.

CONCLUSION.

It would therefore, appear, that the District Court and the Circuit Court of Appeals for the Sixth Circuit have decided an important question of general law in a way probably untenable and in conflict with the weight of authority and in conflict with applicable decisions of this court.

Petitioner further believes that there is here involved important questions of Federal Law which are of such wide importance and public interest and concern that the principles should be definitely set forth and decided by this court.

Respectfully submitted,

James N. Linton,

Henry J. Linton,

Attorneys for Petitioner.